Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

GULSHAN B. SINGH, M.D. and DALJIT SINGH, INDIVIDUALLY AND AS TRUSTEES FOR THE GULSHAN B. SINGH, M.D., P.A. PROFIT SHARING PLAN, DEFINED BENEFIT PENSION PLAN AND MONEY PURCHASE PENSION PLAN,

Petitioners,

vs.

DREXEL BURNHAM LAMBERT INCORPORATED, DAVID PINES and GREGORY YANKWITT,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the Florida Court of Appeal – that claims asserted under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2) (1982), are arbitrable – conflicts with *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182 (1953), in the wake of *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332 (1987)?

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STATEMENT OF THE CASE

Petitioners filed a two-count Complaint in state court against Drexel Burnham Lambert, Inc. ("Drexel Burnham") and its two employees, David Pines and Gregory Yankwitt, alleging violations of Section 12(2) of the Securities Act of 1933 and 18 U.S.C. § 1962 ("RICO"). Petitioners alleged misrepresentations and omissions in connection with investment accounts Petitioners opened at Drexel Burnham.

At the time Petitioners opened their accounts at Drexel Burnham, Petitioners executed written customer agreements in which they agreed to arbitrate "any controversy" arising out of their account. One of the agreements signed by Petitioners provided the following:

> Any controversy between you and the undersigned arising out of said contract or relating to this contract or the breach thereof, shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association, the New York Stock Exchange, Inc., or the National Association of Securities Dealers, Inc., as the undersigned may elect.

Drexel Burnham filed a motion to compel arbitration of the dispute pursuant to the Federal Arbitration Act, 9 U.S.C. § 2 et seq. (1982). On October 27, 1987, the state court granted the motion to compel arbitration based on this Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332 (1987).

The trial court's order was affirmed by Florida's Fourth District Court of Appeal on August 10, 1988. The Florida Supreme Court denied a petition to invoke discretionary jurisdiction on October 21, 1988. This petition for writ of certiorari followed.

Petitioners take the position that the decision of the Florida court conflicts with the Supreme Court's decision in *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182 (1953). Petitioners further assert that certiorari jurisdiction is appropriate because the Supreme Court has already granted certiorari on the identical issue in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 845 F.2d 1296 (5th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3343 (U.S. Nov. 15, 1988) (No. 88-385).

To the extent that Petitioners seek review to resolve the conflict that exists between various federal and state courts, Drexel Burnham agrees that a decision by the Supreme Court is appropriate to provide uniformity throughout the nation on the issue of whether Section 12(2) claims are presently arbitrable in light of *McMahon*. However, Drexel Burnham also maintains that (1) in this instance no conflict exists with *Wilko* in light of *McMahon* and (2) certiorari review in this case is unnecessary and duplicative since the *Rodriguez* case is legally and factually identical.[1]

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[1] The *Rodriguez* case is slightly different from a procedural standpoint because *Rodriguez* involves a petition for writ of certiorari to the U.S. Fifth Circuit Court of Appeals, as opposed to a state appellate court in this case. However, in substantive terms, the two cases present the identical legal issue.

REASONS FOR DENYING THE WRIT

First, Drexel Burnham asserts that the decision of Florida's Fourth District Court does not conflict with *Wilko, supra,* in view of the Supreme Court's analysis of *Wilko* in *McMahon*. More specifically, this Court in *McMahon* effectively overruled *Wilko* because "most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable." 107 S.Ct. at 2340. Therefore, no conflict is presented in this case and the Court could properly deny the petition for writ of certiorari.

Second, this Court granted certiorari in *Rodriguez* on the issue of whether claims under Section 12(2) of the Securities Act of 1933 are arbitrable in light of the *McMahon* decision. The parties have completed briefing in the *Rodriguez* case and oral argument is scheduled for March 27. Without question, the Court's decision in *Rodriguez* will be dispositive of this case.

Drexel Burnham has reviewed the brief submitted by the Respondent in *Rodriguez* and believes that all significant legal issues have been addressed in a thorough and effective manner. Therefore, Drexel Burnham respectfully submits that granting certiorari in this case will not benefit the Court or the parties herein. To the contrary, Drexel Burnham suggests that granting certiorari would be inefficient and would waste the Court's precious resources.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Court deny the petition for writ of certiorari.

Dated: Miami, Florida
March 2, 1989

Respectfully submitted,

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